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Before the
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Amendment of Section 1.1204 of the Commission's Ex Parte Rules	)	GC Docket No. 00-219
	)	

To: The Commission

COMMENTS OF VODAFONE GROUP

The Vodafone Group, Plc., through its business unit Vodafone Americas Asia Region Inc. ("Vodafone"), hereby responds to the *Notice of Proposed Rulemaking* seeking comment on the Commission's proposal to broaden the current exemption in Section 1.2104(a)(6) of the *ex parte* rules to include certain presentations from foreign regulators.[1] The Vodafone Group, Plc. is the world's largest mobile telecommunications provider, with operations in over 25 countries. Among these, Vodafone holds a 45 percent ownership interest in Verizon Wireless, a U.S. operator, and a 100 percent ownership interest in Globalstar USA, Inc., a U.S. mobile satellite service provider.[2] As Vodafone is involved in regulatory proceedings worldwide and in the United States, Vodafone takes this opportunity to express concern regarding the potential impact of the proposed *ex parte* exemption.

As discussed herein, Vodafone opposes the proposed rule because it would undermine the transparency of the Commission's application review and rulemakings proceedings, contrary to principles of sound agency decisionmaking, and create a risk of a prejudicial impact on applicants' interests. Also, the Commission has not sufficiently explained why the rule is necessary or how it would serve the Commission's statutory objectives, even in light of the

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List A B C D E

[1] *Amendment of Section 1.1204 of the Commission's Ex Parte Rules, Notice of Proposed Rulemaking*, GC Docket No. 00-219, FCC 00-392 (rel. Dec. 15, 2000), 65 Fed. Reg. 81474 (Dec. 26, 2000) ("*NPRM*").

[2] The remaining 55 percent ownership interest in Verizon Wireless, as well as the controlling ownership interest, is held by Verizon Communications, Inc.

increasingly global nature of the telecommunications business. The current rule suffices to address the Commission's stated public interest objectives and should be retained.

DISCUSSION

I. The Proposed Rule Is Contrary to Recognized Principles of Sound Agency Decisionmaking and Creates a Risk of Prejudicial Impact

The proposed rule would undermine the value of public comment, since interested parties would be unaware until after release of a decision of facts, arguments or other evidence that may well have had a significant role in the Commission's decisionmaking. Courts have established that an agency's failure to enable affected parties in its proceedings to respond to information discussed in *ex parte* presentations is problematic for a number of reasons, including: undermining the value of public comment and response (and the accompanying vetting of issues via adversarial review); jeopardizing affected parties' due process interests; and undermining meaningful judicial review.[3] By its own terms, however, the proposed rule increases the risk that important issues raised on an *ex parte* basis will go unaddressed or unrebutted, and that inaccurate or outdated information is not fully vetted through adversarial public scrutiny. Even beyond the issue of whether the proposed rule is consistent with principles of sound agency decisionmaking, there are questions of fundamental fairness that have been noted previously by the Commission and the judiciary.

For example, courts have expressed particular concern that: "[o]nly when the public is adequately informed can there be any exchange of views and any real dialogue as to the final decision. And without such dialogue any notion of real public participation is necessarily an illusion."[4] In this vein, the Commission has stated that the purpose of its *ex parte* rules is "to assure that the agency's decisions are based upon a publicly available record rather than

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[3] *United States Lines, Inc. v. Federal Maritime Commission*, 584 F.2d 519, 540-541 (D.C. Cir. 1978); *see Home Box Office v. FCC, 567 F.2d 9* (D.C. Cir. 1977); *American Lithotripsy Society v. Sullivan*, 785 F.Supp 1034 (D.D.C. 1992); *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974).

[4] *See United States Lines*, 584 F.2d at 540.

influenced by off-the-record communications between decision-makers and outside persons," an objective "grounded on basic tenets of fair play and due process."[5]

Any exemptions to the Commission's *ex parte* rules that preclude interested parties from rebutting information submitted into the record in advance of a Commission or Bureau-level decision must be viewed in light of judicial admonitions -- and Commission acknowledgment -- of the critical policy objectives served by adversarial review of record information prior to an agency decision. As demonstrated in the comments submitted in earlier Commission proceedings, even the current exemption for DOJ and the FTC raises significant policy concerns in this regard.[6] Even assuming *arguendo* that the current rule is consistent with principles of sound agency decisionmaking, expanding its scope to include foreign regulators in the class of agencies covered by this exemption is contrary to those principles and should not be adopted.

II. Disclosure of Foreign Regulators' *Ex Parte* Presentations in an *Order* Does Not Mitigate the Potential Prejudicial Impact on Affected Parties

Assuming that any decisionally significant information provided by a foreign regulator would, in compliance with the rule, presumably be discussed later in a Commission *Order*, the fact remains that such material might be presented to the Commission without the affected parties' knowledge prior to release of a Commission or Bureau-level decision. While disclosure of such a communication in a Commission *Order* would perhaps address the Administrative Procedure Act's ("APA") "whole record" requirement, it does not mitigate the prejudicial impact of the rule, given the types of Commission proceedings in which the new rule would apply – in particular, proceedings involving the transfer of control or assignment of a Title III license or

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[5] *See Amendment of 47 C.F.R. Sec 1.1200 et seq. Concerning Ex Parte Presentations in Commission Proceedings*, 10 FCC Rcd. 3240, ¶ 2 (1995); *Amendment of Subpart H, Part 1 of the Commission's Rules and Regulations Concerning Ex Parte Communications and Presentations in Commission Proceedings*, 2 FCC Rcd. 3011, ¶ 5 (1987).

[6] *See, e.g.*, Comments of U S WEST, BellSouth and MCI in GC Docket No. 95-21, filed April 13, 1995. The Commission largely affirmed the rule in 1997 and 1999 in a subsequent rulemaking proceeding, holding that the free consultation between agencies "furthers the public interest by facilitating inter-agency coordination that leads to more effective, expedited, and consistent enforcement of the laws relating to telecommunications competition." *Amendment of 47 C.F.R. § 1.1200 et seq. Concerning Ex Parte Presentations in Commission Proceedings*, 12 FCC Rcd. 7348, 7368-69 (1997), *modified*, 14 FCC Rcd. 18831 (1999).

Section 214 authorization involving mergers or similar transactions, and perhaps even initial Section 214 or Title III applications, or Section 63.11 foreign carrier affiliation notifications.

As the courts have determined, *ex parte* communications even between U.S. government agencies can create due process considerations that may not apply in rulemakings.[7] For the parties involved in these transactions, transparency in these proceedings is crucial, both for due process reasons and to provide certainty as to both (1) the timing of a final Commission or Bureau-level decision, and (2) the relevant factors the agency deems relevant to its public interest determination. If the information discussed in the *ex parte* communication is not disclosed and the parties' applications are either denied or, more likely, granted subject to conditions, the parties could be in the awkward position of having expended considerable resources in prosecuting the applications while having had no forewarning of the legal or factual bases for the Commission's decision.

This is particularly problematic in transactional matters in which the parties have entered into contractual agreements that obligate them to obtain certain approvals and where the confidence of the public capital markets is often carefully attuned to the outcome of these agency proceedings. Disclosure of the foreign regulator's facts and evidence in an *Order* does little, if anything, to mitigate the adverse impact of failure to disclose what, in fact, may be easily refuted information. As a practical matter, the Commission might well choose to bring decisionally significant issues or facts to the parties' attention in advance of a decision. Nevertheless, such disclosure should be mandatory, rather than discretionary.[8] Indeed, if the Commission were inclined to bring such decisionally significant matters to the parties' attention, there is no basis for an exemption from the usual *ex parte* disclosure rules, as proposed in the *NPRM*.

The conclusion that disclosure of such *ex parte* presentations, *prior* to the issuance of an *Order*, should be mandatory is exemplified by the D.C. Circuit's decision in *United States Lines*. In that case, the agency had considered *ex parte* communications from foreign governments that

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[7] *See Sierra Club v. Costle*, 657 F.2d 298, 406-407 (1981), *rev'd on other grounds*, 463 U.S. 680 (1983) (docket submissions "may be necessary to ensure due process . . . where such conversations directly concern the outcome of adjudications or quasi-adjudicatory proceedings").

[8] Given the Commission's stated intent to consider "international" factors, carriers might be concerned that the Commission will increasingly consider the extraterritorial activities of their foreign carrier affiliates as relevant public interest factors in reviewing merger applications.

were of some decisional significance, but these communications were not disclosed to opposing parties participating in the proceeding. The court's reasoning is directly relevant to the *NPRM*:

> [T]here was no opportunity for a real dialogue or exchange of views. USL was not informed of, *let alone given the opportunity to respond to*, the new arguments of . . . the French and German Governments as to the proposed agreement ... And it was after consideration of these *ex parte* arguments and responses, with no opportunity for further rebuttal, that the Commission reversed its position . . . .
>
> Our cases . . . make clear *the critical role of adversarial comment in ensuring proper functioning of agency decisionmaking* and effective judicial review. Such comment serves not only to clarify the issues and positions being considered *at the agency level*, but also to ensure that factual questions underlying the agency's decision are not raised, by necessity, for the first time on judicial review. And adversarial comment is particularly critical where, as here, *ex parte* communications are made by a party interested in securing the Commission approval necessary for the legality of its contracts.[9]

As noted above, the Commission has stated similarly that the purpose of its *ex parte* rules is "to assure that *the agency's decisions* are based upon a publicly available record rather than influenced by off-the-record communications between decision-makers and outside persons."[10] These same policy considerations militate against exempting foreign regulators from the *ex parte* rules. Where significant factors are not known to the affected parties until the time of a Commission *Order*, the benefit of adversarial comment cited in *United States Lines* is lost. Moreover, the likelihood that factual questions underlying the agency's decisions are raised for the first time on judicial review is substantially increased. As the D.C. Circuit makes clear, it is important that the full public comment process be played out *prior to* a Commission or Bureau-level decision, rather than afterward.

Finally, and underscoring the potential prejudice to affected parties, the proposed rule would significantly increase the burdens of litigation and associated delays in implementing Commission or Bureau decisions. For affected carriers, it is far less burdensome to rebut information submitted on an *ex parte* basis prior to release of an *Order* rather than afterward. *Ex*

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[9] *United States Lines*, 584 F.2d at 540-41, 542 (emphasis added).

[10] *See Amendment of 47 C.F.R. Sec 1.1200 et seq. Concerning Ex Parte Presentations in Commission Proceedings*, 10 FCC Rcd. 3240, ¶ 2 (1995) (emphasis added); *Amendment of Subpart H, Part 1 of the Commission's Rules and Regulations Concerning Ex Parte Communications and Presentations in Commission Proceedings*, 2 FCC Rcd. 3011, ¶ 5 (1987).

parte communications disclosed prior to a decision may be rebutted simply by submitting another *ex parte* presentation. In contrast, parties must seek either reconsideration, full Commission review (in the case of Bureau-level decisions) or judicial review of an *Order*, and must meet specific procedural and substantive showings for each.[11] If challenged, this subjects the ultimate resolution of a Commission or Bureau-level *Order* to uncertainty, given the considerable time that the Commission and courts can take in reviewing an *Order*. The practical result of the proposed rule may well be increased litigation burdens for the Commission and its staff, and increased delay in implementing Commission or Bureau decisions.

III. The Commission Can Account for the Globalization of the Telecommunications Marketplace in its Public Interest Review of Mergers/Transactions Without Amending the *Ex Parte* Rules as Proposed

The Commission posits that the current rule "fails to take into account an important dimension in the oversight of telecommunications competition, namely the increased globalization of telecommunications competition issues" and that "the public interest requires the effective, expedited, and consistent exercise of authority on the international as well as national scale . . . ."[12] Vodafone, as a telecommunications operator in 25 countries, agrees that the global dimension in telecommunications issues is increasing and we wholeheartedly support the Commission's efforts to promote open markets for telecoms services.[13]

The Commission has not, however, indicated how this public interest objective is somehow disserved by the *ex parte* rules. Section 1.2104(a)(6) of the rules currently exempts from the *ex parte* rules certain presentations by the United States Department of Justice ("DOJ") and Federal Trade Commission ("FTC") involving "a telecommunications competition matter in a proceeding which has not been designated for hearing and in which the relevant agency is not a

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[11] *See* 47 C.F.R. §§ 1.106, 1.115, 1.429 (discussing the factual/substantive burdens imposed on parties seeking reconsideration or Commission review of an *Order*). On judicial review, moreover, a Commission decision would likely be subject to the deferential arbitrary and capricious standard of review.

[12] *NPRM* ¶¶ 3, 4.

[13] *See Vodafone AirTouch Plc and Bell Atlantic Corporation*, DA 00-721 ¶ 13 (rel. March 30, 2000) (we are guided also by the U.S. Government's commitment under the [WTO] Basic Telecommunications Agreement, which seeks to promote global markets for telecommunications so that consumers may enjoy the benefits of competition"); *AT&T Corp., British Telecommunications, plc, Memorandum Opinion and Order*, 14 FCC Rcd. 19140, ¶¶ 28-61 (1999) (discussing "global seamless services" market).

party or commenter"[14] The Commission adopted this rule on the basis that it "will promote the public interest through the exchange of information and ideas between the Commission and the other principal agencies responsible for promoting or ensuring competition in the telecommunications industry."[15] The Commission reasoned further that the rule "should lead to more effective enforcement and protection of the public interest, development and application of more consistent analytical methodologies, an improved, expedited license transfer process, and the possible avoidance of unnecessarily duplicative efforts."[16] These same reasons are cited in the *NPRM* as a basis for the proposed rule change.[17]

These reasons, as well as the global nature of some telecoms operations, are all valid reasons for cooperative discussions between U.S. and foreign regulators on general methods of analysis, for example, or on general approaches to evaluating license transfers. But the proposed rule change is unnecessary for this purpose: these types of communications on general methods, when not undertaken with regard to a specific proceeding, are likely not subject to the *ex parte* rules at all.[18] The *NPRM* still does not explain why, in the context of a specific proceeding, the *ex parte* rules hinder the exchange of information and ideas between it and a foreign regulator. The *NPRM* cites no instances in which the *ex parte* disclosure rules have obstructed the Commission's work in a given proceeding. It might be stating the obvious to note that, theoretically, any interested party might be more forthcoming where the conversation is not publicly disclosed. If this is the basis for the proposed rule, however, the Commission must so state and, moreover, it must show how the benefits of using nondisclosure to promote the exchange of ideas trumps the public interest in transparent, on-the-record decisionmaking.

Vodafone's experience across 25 countries has been that more transparency, not less, improves the quality of regulatory decisionmaking, and that the United States has been an important leader in this regard. Indeed, the Commission has noted this as well. In sharing the

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[14] 47 C.F.R. § 1.2106(a)(6).

[15] *Amendment of the Commission's Ex Parte Rules*, 9 FCC Rcd. 6108, ¶¶ 2-3 (1994).

[16] *Id.* ¶ 2.

[17] *NPRM* ¶¶ 3-4.

[18] For example, the Commission presently has a fairly robust International Visitors Program, for precisely this purpose. *See* <http://www.fcc.gov/ib/ivp/> (visited Jan. 24, 2001).

benefits of the Commission's expertise with foreign regulators, the Commission has correctly emphasized the primary importance of transparent decisionmaking:

> We made it clear that the independent regulator must be infused with a culture of transparent, independent decisionmaking ...[t]he regulator must operate through open and fair procedures that allow all parties to participate. The decisions must be made with dispatch, in public, and they must be consistent. These features are important for fairness to the public and the regulated parties, and for the regulator's credibility as a receptive and honest broker.
>
> The regulator also must be free from political pressure. This is perhaps the most difficult feature to achieve. But it is the most important task of all...The independent regulator should report only to the public.[19]

At the very least, then, the Commission should explain in more detail how transparency undermines its public interest objectives in this case.

Finally, Vodafone notes that there are significant questions as to whether the Commission has authority to afford foreign government agencies the same treatment as U.S. regulatory agencies. Foreign regulators are not included in the definition of "agency" in the APA;[20] rather, a foreign government, as a "public . . . organization other than an agency" would instead be deemed a "person" under the APA.[21] There is thus an express distinction in the APA between U.S. and non-U.S. governmental agencies.[22] As the underlying premise of federal agencies' *ex parte* rules is compliance with the APA's "whole record" and due process safeguards, the

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[19] Building New Crossroads for the Information Age--Remarks of Chairman William E. Kennard -- December 4, 2000, Budapest, Hungary.

[20] The APA, in relevant part, defines "agency" as "each authority *of the Government of the United States*, whether or not it is within or subject to review by another agency . . . ." *See* 5 U.S.C. § 551(1) (emphasis added).

[21] *See* 5 U.S.C. § 551(1), (2).

[22] This distinction is also reflected in the FOIA context, in which courts have indicated that Exemption 5 for "inter-agency" documents does not include documents submitted by government entities (in this case, tribal governments), in cases where "the matters with respect to which [the agency] sought advice were matters in which the Tribes had their own interest and the communications presumptively served that interest, even if they incidentally benefited the [agency]." *See Klamath Water Users Protective Ass'n v. Department of Interior*, 189 F.3d 1034, 1038 (9th Cir. 1999) (*citing County of Madison v. Department of Justice*, 641 F.2d 1036, 1040 (1st Cir. 1981)).

Commission should arguably be wary of treating U.S. and foreign regulators the same under those APA-based rules.[23]

Regardless of whether it formally participates in a Commission proceeding, a foreign regulator has its own policy interests, which the Commission and other U.S. government agencies may not necessarily share, and its own constituency -- the public and regulated entities of the foreign nation -- which the Commission absolutely does *not* share.[24] More troubling is a situation in which a foreign regulator has a community of interest with a foreign carrier by virtue of the latter being government-owned or controlled. Thus, the Commission's apparent presumption that a foreign regulator necessarily cannot be an interested party so long as it does not actively participate in the formal comment/opposition stage of a proceeding is incorrect.

There may well be extraordinary cases, such as enforcement proceedings, where disclosure of an inter-agency *ex parte* communication is not advisable. But these should be the exception, not the general rule; the Commission can, if necessary, elect to treat those proceedings differently, on a case-by-case basis. In general, while the Commission should not necessarily be precluded from affording significant weight to record information submitted by a foreign regulator, we can think of no legitimate reason why it is necessary to have these submissions

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[23] *See* 5 U.S.C. § 706; *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 419-20 (1970); *Policies and Procedures Regarding Ex Parte Communications During Informal Rulemaking Proceedings*, 93 FCC 2d 1250, ¶ 13 (1983).

[24] This fact was reflected in the debate over the Commission's International Settlements Policy, wherein foreign regulators objected that the Commission was attempting to assert extra-territorial jurisdiction. *International Settlement Rates*, IB Docket No. 96-261, *Report and Order*, 12 FCC Rcd. 19,806 (1997), *aff'd sub. nom., Cable & Wireless P.L.C. v. FCC*, 166 F.3d 1224 (D.C. Cir. 1999). Indeed, for the Commission to assert any sort of common jurisdiction with foreign regulators would run afoul of the territorial limits of its authority. *See Regulation of International Accounting Rates*, 7 FCC Rcd. 559, 561 (1991); *AT&T et al.*, 88 FCC 2d 1630, 1649 (1982); *Uniform Settlement Rates*, 84 FCC 2d 121, 122 (1980) (all discussing territorial limits on Commission jurisdiction).

done in secret, or to preclude interested parties from responding to such information prior to the release of a Commission or Bureau-level decision.

CONCLUSION

For the foregoing reasons, the Commission should not adopt the proposed rule.

Respectfully submitted,

VODAFONE GROUP, PLC.

By: 

Charles D. Cosson
Senior Counsel, Public Policy
Vodafone Americas Asia Inc.

2999 Oak Rd., 10th floor
Walnut Creek, CA 94596
1-925-210-3812
1-925-210-3599 FAX
Chuck.Cosson@vodafone-us.com

Its Attorney

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